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DISTRICT II

April 17, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP1494-CR State of Wisconsin v. Sangolden E. Gilbert (L.C. #1999CF427)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Sangolden E. Gilbert appeals pro se from an order denying his motion for sentence modification. Based on our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm the order of the circuit court.

In 1999, Gilbert was convicted following pleas of no contest to burglary, armed robbery, and false imprisonment by use of a dangerous weapon, all as a party to the crime. The circuit

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

court sentenced him to an aggregate sentence of forty years of imprisonment for the burglary and armed robbery. It also imposed and stayed a two-year sentence for the false imprisonment and placed Gilbert on five years of probation.

In 2012, Gilbert filed a motion for sentence modification, arguing that the circuit court should reduce his sentence because it was unaware when it sentenced him that his mandatory release date was only presumptive under WIS. STAT. § 302.11(1g).[2] Gilbert also sought modification because the court and his attorney failed to inform him of this provision when he entered his pleas. The circuit court denied the motion. This appeal follows.

On appeal, Gilbert first contends that he is entitled to sentence modification on the basis of a new factor. He argues that the circuit court should have modified his sentence because it was unaware of WIS. STAT. § 302.11(1g) and its effect on his mandatory release date at the time of sentencing.

A circuit court may modify a defendant's sentence upon a showing of a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The analysis involves a two-step process. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. ***Id.***, ¶36. Second, the defendant must show that the new factor justifies sentence modification. ***Id.***, ¶¶37-38. A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because … it was unknowingly overlooked by all of the

[2] Under WIS. STAT. § 302.11(1g), the earned release review commission may deny mandatory release to a defendant who is serving an indeterminate sentence for a serious felony if it is necessary to protect the public or if the defendant has refused to participate in counseling or treatment.

parties." ***Id.***, ¶40 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. *See* ***Harbor***, 333 Wis. 2d 53, ¶33. If the fact or set of facts do not constitute a new factor as a matter of law, we need go no further in our analysis. ***Id.***, ¶38.

Upon review of the record, we conclude that Gilbert's mandatory release date does not constitute a new factor as a matter of law. Nothing in the court's sentencing comments reveal a reliance on a specific mandatory release policy. Instead, the court focused its remarks on the primary sentencing factors: the gravity of the offense, the character of the offender, and the need to protect the public. Because Gilbert cannot show that his mandatory release date was highly relevant to the court's decision, the court's unawareness of WIS. STAT. § 302.11(1g) does not constitute a new factor.

Gilbert next contends that he did not knowingly, voluntarily, and intelligently enter his pleas because the circuit court and his attorney failed to inform him about WIS. STAT. § 302.11(1g). Accordingly, he seeks sentence modification on this basis.

Again, Gilbert's argument is without merit. In ***State v. Yates***, 2000 WI App 224, ¶17, 239 Wis. 2d 17, 619 N.W.2d 132, this court held that the effect of a defendant's presumptive mandatory release date was a collateral consequence of his plea, and therefore, the circuit court's failure to inform him of that did not warrant relief. *See* ***id.***, ¶¶9-17. This court reasoned that this was a collateral consequence because whether a defendant will be denied mandatory release depends on his postsentencing conduct and the parole commission's decision. ***Id.***, ¶11. Thus, under ***Yates***, Gilbert did not have to be aware that his mandatory release date would only be

presumptive in order to validly enter his pleas. Consequently, neither the circuit court nor his attorney had any obligation to tell him this information.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals